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Supreme Court, U.S.
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No. 99-1503

IN THE
Supreme Court of the United States

KRIS NELSON,
Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On the Brief:
DOUGLAS K. DEVRIES
MART & DEVRIES
721 Ninth Street
Suite 300
Sacramento, CA 95814
(916) 441-4994

WILLAM S. SHERNOFF
MICHAEL J. BIDART
JEFFEREY ISAAC EHRLICH
SHERNOFF, BIDART,
DARRAS & DILLON
600 S. Indian Hill Blvd.
Claremont, CA 91711
(909) 621-4935

ARNOLD R. LEVINSON
Counsel of Record
REBECCA GREY
PILLSBURY & LEVINSON, LLP
One Embarcadero Center
38th Floor
San Francisco, CA 94111
(415) 433-8000

Attorneys for Petitioner
Kris Nelson

Wilson-Epes Printing Co., Inc. – (202) 789-0096 – Washington, D. C. 20001

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I. THE SPECIAL AND IMPORTANT QUESTIONS PRESENTED IN THIS CASE WARRANT IMMEDIATE REVIEW BY THIS COURT.

UNUM incorrectly asserts that Nelson "never articulated any reason" why the Ninth Circuit should review the District Court's order before a judgment was rendered. Nelson argued there, as she does here, that the issue was of extraordinary importance and raised an urgent question ripe for immediate resolution. *Bauman* v. *United States Dist. Court,* 557 F.2d 650, 654-55 (9th Cir. 1977). Indeed, Nelson requested the Ninth Circuit to address a question which was so important that the United States Solicitor General asked this Court to consider it in *Ward* and which this Court in *Ward* acknowledged was unanswered. Further, as explained in Nelson's petition, this Court's recent opinion in *Ward* is in direct conflict with the Ninth Circuit's controlling authority on the issue, *Kanne v. Connecticut General Life Ins. Co.,* 867 F.2d 489 (9th Cir. 1988).

Like her petition for a Writ of Mandamus to the Ninth Circuit, Nelson's petition for certiorari detailed the hardships faced by millions of insureds barred from effective relief by the erroneously expanding scope of ERISA preemption. Petition for writ of certiorari ("Petition"), 19-22. Nelson also demonstrated that the undisputed split among the circuits is being further riven by the lower courts' inconsistent attempts to determine the Supreme Court's instruction on the subject. Petition, 8-18. The issue facing petitioner, and many other sick and disabled insureds, requires urgent resolution, and may only be resolved by the Supreme Court.

Moreover, as UNUM concedes by its citation to the varying interpretations of this Court's authority, the confusion wrought by the interplay between *UNUM Life Ins. Co. v. Ward,* 119 S.Ct. 1380 (1999), and *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987), is being reproduced by lower

courts engaged in a precedential guessing game. Opposition to petition for certiorari ("Opposition"), 17. Lower courts across the country are attempting to decipher the meaning of *Pilot Life* since *Ward* expressly limited its holding. This sort of increasingly conflicted and varied application of law about a question which affects insurance coverage for millions of insureds and which changes the posture of thousands of cases is appropriate for immediate resolution. This Court, and only this Court, can resolve the nationwide quandary. Nelson respectfully requests that it do it now.

UNUM mischaracterizes Nelson's challenge as one regarding the District Court's abuse of discretion. While UNUM correctly notes that a motion to amend is subject to the District Court's exercise of its sound discretion, the District Court did not decide the issue in that fashion. To the contrary, the District Court found that Nelson's proposed amendment was barred by *Kanne* and thus the court had no discretion to permit Nelson to proceed.

Nelson's Mandamus petition urged the Ninth Circuit to acknowledge the incontrovertible conclusion that *Ward* directly contradicted *Kanne* and to address this important and unsettled question. Nelson further sought the Ninth Circuit to require the lower court to apply the recently clarified test to determine whether a state law is one which regulates insurance as announced in *Ward.*

II. THIS COURT ACKNOWLEDGED THAT THE QUESTION REGARDING WHETHER ERISA'S ENFORCEMENT SCHEME PRECLUDES STATE LAWS WHICH REGULATE INSURANCE IS UNSETTLED.

UNUM erroneously claims that the law is now settled that ERISA's civil enforcement scheme preempts state law bad faith claims. While UNUM claims that the issue was decided in the *Pilot Life* case, this Court made clear in *Ward* that the law is not settled.

UNUM contends that *Ward* merely elucidated the respective positions of the Solicitor General in 1999 and 1987. In fact, the Court posited the Government's view in contrast to "UNUM's view of §502(a)'s preemptive force". *Ward,* 119 S.Ct. 1391. The Court presented the Solicitor General's argument that saved laws were not preempted by virtue of ERISA's enforcement scheme in contrast to "UNUM's view' that they were preempted, and then expressly elected not to resolve the issue. The Court would not have mentioned that it declined to decide the issue argued by the Government and UNUM were there no question in the law in the first instance. Indeed, the Court would not need to refer to "UNUM's view" at all were "UNUM's view" the "firmly established" law, as it suggests. Opposition, 10.

The post—*Ward* district court cases cited by UNUM attempting to glean this Court's mandate regarding ERISA preemption have split down the middle. Opposition, 17. While UNUM claims the law is settled and *Ward* changed nothing, the district courts to which UNUM refers indicate otherwise. See e.g., *Hoffman v. Empire Blue Cross,* 1999 WL 782518, *7 (S.D.N.Y. 1999) (citing *Ward's* footnote 7, "It remains an open question whether ERISA preempts causes of action conferred by state laws that regulate insurance.") *Selby v. Principal Mutual Life Ins. Co.,* 2000 WL 178191, *3 (S.D.N.Y. 2000) (*Ward* did not resolve the question of whether ERISA preempts a claim based upon a state law regulating insurance.) *Lewis v. Aetna Life Ins. Co.,* 78 F.Supp.2d 1202, 1204 (N.D. Okla. 1999) (*Ward* changed the analysis for preemption of saved laws.)

Even the sole published lower court case cited by UNUM finding that a saved law was preempted acknowledged the unsettled nature of the preemption issue after *Ward. Clancy v. Employers Health Ins. Co.,* 1999 WL 1072540, *6, n. 11 (E.D. La. 1999) ("the Supreme Court has yet to decide

whether ERISA §502(a) provides the exclusive remedy for an enforcement action.")[1]

Indeed, UNUM's opposition explains precisely why this Court should accept this petition. According to UNUM, the questions presented by the petition were squarely decided in the *Pilot Life* case. It is UNUM's view that courts throughout the country acknowledge that *Pilot Life* has resolved the question. The District Court in this instance agreed. The Ninth Circuit has previously expressed the same opinion in *Kanne.*

In support of its claim that the law is settled, UNUM contends that "thousands" of courts have followed UNUM's interpretation of *Pilot Life* with the exception of "only one anomalous decision", *Franklin H. Williams Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995). Opposition, 15. If that is the case, then courts throughout the land have misinterpreted this Court's prior decision in *Pilot Life,* thereby dramatically increasing the need for this Court to clarify the issue. Whether or not *Williams* is characterized as an anomaly or as directly contrary to *Kanne,* a clear conflict exists between the circuits which also should demand this Court's attention.

The raging debate regarding the scope of ERISA preemption will continue to produce erratic results, upending the will of Congress in enacting the preemption clause in the first place. Courts will continue to juggle the triad of ERISA's savings clause, the *Pilot Life* decision and the decision in *Ward.*

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[1] Despite UNUM's characterization of this Court's decisions in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank,* 510 U.S. 86 (1993), and *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990), as part of a necessary background supporting contention that state insurance laws are preempted by ERISA, *Clancy* makes no mention of them; neither, for that matter, does *Ward.*

This Court's need to resolve the questions presented is bolstered by UNUM's contention that the district courts which have addressed the issue have split precisely in half. Opposition, 17. Fifty-percent have accepted Nelson's interpretation of *Ward* and fifty-percent have accepted UNUM's. Thus, according to UNUM, fully half the federal district courts which have addressed the issue have, according to UNUM, misunderstood this Court's precedent and accepted a fictionalized version of this Court's opinion in *Ward.* Opposition, 17. In contrast to UNUM's claim that the law is clear, this schism among the courts demonstrates there is enormous confusion among the distinguished members of the federal judiciary regarding the meaning of this Court's recent decisions.

This may be in large part because—except for this Court's decisions—there is very little to which these lower courts can refer. These courts are left to postulate this Court's ultimate resolution of the issue. The sharp conflicts among both the circuit courts and among the district courts clearly show the wildly inconsistent results which will inevitably appear absent this Court's resolution of the issue.

UNUM's attempts to bolster its claims that the law is settled with the citation to other garden variety preemption authorities from this Court is ineffective. These cases are inapplicable and this Court was undoubtedly aware of them at the time it issued its opinion in *Ward. Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987), involved a law of general application. "This lawsuit . . . is based upon common law of general application *that is not a law regulating insurance* [citing *Pilot Life*]. Accordingly, the suit is preempted." *Id.* at 62 (emphasis added).

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), involved a wrongful termination claim; also a law of general applicability. The Court held that because the plaintiff asserted that he was terminated so that his employer could avoid paying his pension benefits, the action "related to" an

employee benefit plan, and was therefore preempted. There was no discussion of the savings clause at all. *Ingersoll-Rand* does not have any bearing on the question of whether saved laws are preempted by virtue of the enforcement scheme. Indeed, *Ingersoll-Rand*, quoting *English v. General Electric Co.*, 496 U.S. 72, 87 (1990), stated "'The mere existence of a federal regulatory or enforcement scheme', however, even a considerably detailed one, 'does not by itself imply preemption of state remedies.'" *Id.* at 143.

Finally, *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), specifically indicates that by saving insurance regulation from preemption, ERISA specifically "leaves room for complementary or dual federal and state regulation." *Id.* at 98. Indeed, California's law of insurance bad faith does not conflict with ERISA's objectives and may exist in harmony with it. "[D]ual regulation under ERISA and state law is not an impossibility[;] [m]any requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield." *Id.* at 100.

UNUM also claims that the principles of conflict preemption preclude Nelson's claims. UNUM's analysis, however, is flawed. UNUM assumes that a state remedy which is different than an ERISA remedy is in conflict with ERISA. This conclusion, of course, ignores the precise terms of the savings clause. More fundamentally, however, simply because a state insurance law may provide a remedy in addition to that provided under ERISA does not make the law one which conflicts with ERISA. On the contrary, it may well complement rather than conflict with ERISA and promote the interests of ERISA to provide for the protection of employee benefits.

Last term, this Court found this very analysis applicable to a federal law which provided a remedy which was an alternative to the controlling state remedy. *Humana v. Forsyth*, 119 S.Ct. 710 (1999), is in many ways analogous to this case.

There, this Court determined whether a federal remedy unduly impinged on a state insurance remedy in violation of the McCarran-Ferguson Act. The Court found the remedies to be harmonious rather than in conflict. The same is true with respect to Nelson's claim that there is nothing which should prohibit her bad faith claims from existing alongside ERISA's remedies. The mere fact that the remedies available under state law differ from those under ERISA does not, as UNUM simply assumes, render them so fundamentally in conflict with ERISA as to invalidate them. Petition, 28-29.

III. UNDER THIS COURT'S DECISION IN *WARD* AND WELL-ESTABLISHED CALIFORNIA PRECEDENTS, INSURANCE BAD FAITH IS A LAW REGULATING INSURANCE.

UNUM's contention that the California bad faith law is not a law regulating insurance is addressed in Nelson's petition and need not be repeated here. Petition, 23-26. UNUM's discussion, however, remains based on its assumption that *Pilot Life* answered the question. It did not, and its citation to the Solicitor General's brief in *Pilot Life* is of little help now.

At least one court has analyzed the issue in great depth. In *Lewis v. Aetna*, 78 F.Supp.2d 1202 (N.D. Okla. 1999), the District Court undertook an analysis of whether Oklahoma's bad faith law constituted a law which regulates insurance under the guidelines as set forth in *Ward*. It found, after careful consideration, that it was just such a law. The analysis in California is precisely the same. In fact, the Oklahoma law of insurance bad faith is based on California's bad faith law.

The *Lewis* court adopted the same reasoning which Nelson presented to the trial court here and which she set forth in her petition.

IV. *STARE DECISIS* DOES NOT PREVENT THIS COURT'S REVIEW.

UNUM also claims that *stare decisis* counsels against an effort by this Court to address this issue presented. This, of course, assumes that the issue has already been decided. No less authority, however, than the Solicitor General has made clear the need to address the issues presented here. In its brief in *Ward*, it stated:

> Resolving the interaction between Congress's intent to make Section 502 an exclusive remedy for claims under ERISA and its simultaneous intent to save state laws that "regulate insurance" would present the Court with the question whether it should reconsider part of the rationale of its decision in *Pilot Life v. Dedeaux*. . . . [T]here may be substantial reasons for the Court to do so. . . . We recognize that *Pilot Life* has been read to preclude even state law causes of action arising under laws that "regulate insurance". That portion of *Pilot Life's* rationale is, however, in significant tension with the text of the insurance savings provisions and was unnecessary to *Pilot Life's* holding that the law at issue there was not in any event an insurance regulation with the meaning of that provision. 1998 WL 839957,*20.

This petition presents the precise issue the Solicitor General recommended to this Court for review.

CONCLUSION

Nelson's petition raises issues of fundamental public importance which require this Court's prompt attention. The appropriate scope of ERISA preemption, long in a state of confusion, is now in a nascent crisis. Federal courts have relied principally and, often erroneously, on *Pilot Life* in wresting meaning between ERISA's preemption and savings provisions. *Ward* clarified that *Pilot Life* did not necessarily preclude saved state law claims in ERISA cases. However, *Ward*

also declined to provide the lower courts with guidance as to what state actions were permitted. This Court is respectfully requested to exercise its discretion to end that crisis.

Respectfully submitted,

On the Brief:

DOUGLAS K. DEVRIES
MART & DEVRIES
721 Ninth Street
Suite 300
Sacramento, CA 95814
(916) 441-4994

WILLAM S. SHERNOFF
MICHAEL J. BIDART
JEFFEREY ISAAC EHRLICH
SHERNOFF, BIDART,
DARRAS & DILLON
600 S. Indian Hill Blvd.
Claremont, CA 91711
(909) 621-4935

ARNOLD R. LEVINSON
Counsel of Record
REBECCA GREY
PILLSBURY & LEVINSON, LLP
One Embarcadero Center
38th Floor
San Francisco, Ca 94111
(415) 433-8000

Attorneys for Petitioner
Kris Nelson